

ROBERT McDONNELL,
Plaintiff,

v.

MICHAEL J. ASTRUE, Commissioner
of Social Security,

Defendant.

)
) No. CV-11-5058-CI
)
) ORDER GRANTING DEFENDANT'S
) MOTION FOR SUMMARY JUDGMENT
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BEFORE THE COURT are cross-Motions for Summary Judgment. ECF No. 19, 26. Attorney Lora Lee Stover represents Robert McDonnell (Plaintiff); Special Assistant United States Attorney Michael S. Howard represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 6. After reviewing the administrative record and briefs filed by the parties, the court **GRANTS** Defendant's Motion for Summary Judgment and **DENIES** Plaintiff's Motion for Summary Judgment.

On October 15, 2007, Plaintiff protectively filed an application for supplemental security income, alleging disability beginning November 1, 2006. Tr. 14; 109. In his application for benefits, Plaintiff reported that he stopped working due to back injury, and "many mental disabilities," which he listed as

1 Attention Deficit Hyperactivity Disorder, panic disorder with
2 agoraphobia, borderline narcissistic traits, Post Traumatic Stress
3 Disorder, Depression, and polysubstance abuse. Tr. 150. Plaintiff's
4 claim was denied initially and on reconsideration, and he requested
5 a hearing before an administrative law judge (ALJ). Tr. 61-95. A
6 hearing was held on July 24, 2009, at which Medical experts Arthur
7 Lorber, M.D., and Margaret Moore, Ph.D., and Plaintiff, who was
8 represented by counsel, testified. Tr. 31-56. ALJ R.J. Payne
9 presided. Tr. 31. The ALJ denied benefits on August 10, 2009. Tr.
10 14-22. The instant matter is before this court pursuant to 42
11 U.S.C. § 405(g).

12 **STATEMENT OF THE CASE**

13 The facts of the case are set forth in detail in the transcript
14 of proceedings and are briefly summarized here. At the time of the
15 hearing, Plaintiff was 45 years old and living on his parents
16 property in a fifth-wheel trailer in Elk, Washington. Tr. 46; 587.
17 He has an eleventh grade education and has worked for short periods
18 as a truck driver, a janitor and as a prep cook. Tr. 586.
19 Plaintiff reported that he had two brief marriages, and he had a
20 teenaged son with whom he had supervised visitation. Tr. 586.
21 Plaintiff has an extensive legal history, including multiple
22 felonies for crimes related to drug possession and deliveries, a sex
23 offense, assault and burglary. Tr. 585.

24 Plaintiff's daily activities include waking up at 6:30 a.m.,
25 watching television, reading a book, doing pushups and eating one
26 meal a day. He also naps during the day. Tr. 587.

27 Plaintiff testified the last time he drank alcohol was four
28 months prior to the hearing, and the last time he used cocaine was

1 at a party about a year prior to the hearing. Tr. 53-54.

2 **ADMINISTRATIVE DECISION**

3 At step one, ALJ Payne found that except for a brief period in
4 2004, Plaintiff had not engaged in substantial gainful activity
5 since 1992. Tr. 16. At step two, he found Plaintiff had the
6 following severe impairments: an affective (bipolar and/or
7 depressive) disorder; an antisocial personality disorder; and a
8 history of polysubstance abuse/dependence, in remission. Tr. 16.
9 At step three, the ALJ determined Plaintiff's impairments, alone and
10 in combination, and even when including his substance
11 abuse/addiction disorder, did not meet or medically equal one of the
12 listed impairments in 20 C.F.R., Subpart P, Appendix 1 (20 C.F.R.
13 §§ 416.920(d), 416.925 and 416.926). Tr. 19. The ALJ found
14 Plaintiff has the residual functional capacity ("RFC") to perform a
15 full range of work at all exertional levels, but with the
16 nonexertional mental limitations that he is moderately limited in
17 his ability to maintain socially appropriate behavior and adhere to
18 basic standards of neatness and cleanliness, and set realistic goals
19 and make plans independently of others. Tr. 20. In his step four
20 findings, the ALJ found Plaintiff's statements regarding pain and
21 limitations were not credible to the extent they were inconsistent
22 with the RFC findings. Tr. 21. The ALJ found that Plaintiff had no
23 past relevant work. Tr. 21. Finally, the ALJ found considering
24 Plaintiff's age, education, work experience, and residual functional
25 capacity, jobs exist in significant numbers in the national economy
26 that the Plaintiff can perform. Tr. 21-22.

27 **STANDARD OF REVIEW**

28 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the

1 court set out the standard of review:

2 A district court's order upholding the Commissioner's
3 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,
4 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the
5 Commissioner may be reversed only if it is not supported
6 by substantial evidence or if it is based on legal error.
7 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).
8 Substantial evidence is defined as being more than a mere
9 scintilla, but less than a preponderance. *Id.* at 1098.
10 Put another way, substantial evidence is such relevant
11 evidence as a reasonable mind might accept as adequate to
12 support a conclusion. *Richardson v. Perales*, 402 U.S.
13 389, 401 (1971). If the evidence is susceptible to more
14 than one rational interpretation, the court may not
15 substitute its judgment for that of the Commissioner.
16 *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of*
17 *Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

18 The ALJ is responsible for determining credibility,
19 resolving conflicts in medical testimony, and resolving
20 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
21 Cir. 1995). The ALJ's determinations of law are reviewed
22 *de novo*, although deference is owed to a reasonable
23 construction of the applicable statutes. *McNatt v. Apfel*,
24 201 F.3d 1084, 1087 (9th Cir. 2000).

25 It is the role of the trier of fact, not this court, to resolve
26 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
27 supports more than one rational interpretation, the court may not
28 substitute its judgment for that of the Commissioner. *Tackett*, 180
F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
Nevertheless, a decision supported by substantial evidence will
still be set aside if the proper legal standards were not applied in
weighing the evidence and making the decision. *Browner v. Secretary*
of Health and Human Services, 839 F.2d 432, 433 (9th Cir. 1988). If
substantial evidence exists to support the administrative findings,
or if conflicting evidence exists that will support a finding of
either disability or non-disability, the Commissioner's
determination is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
1230 (9th Cir. 1987).

SEQUENTIAL PROCESS

The Commissioner has established a five-step sequential evaluation process for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a), 416.920(a); see *Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987). In steps one through four, the burden of proof rests upon the claimant to establish a prima facie case of entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-99. This burden is met once a claimant establishes that a physical or mental impairment prevents him from engaging in his previous occupation. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4). If a claimant cannot do his past relevant work, the ALJ proceeds to step five, and the burden shifts to the Commissioner to show that (1) the claimant can make an adjustment to other work; and (2) specific jobs exist in the national economy which claimant can perform. *Batson v. Commissioner of Social Sec. Admin.*, 359 F.3d 1190, 1193-94 (2004). If a claimant cannot make an adjustment to other work in the national economy, a finding of "disabled" is made. 20 C.F.R. §§ 404.1520(a)(4)(I-v), 416.920(a)(4)(I-v).

Plaintiff has the burden of showing that drug and alcohol addiction (DAA) is not a contributing factor material to disability. *Ball v. Massanari*, 254 F.3d 817, 823 (9th Cir. 2001). The Social Security Act bars payment of benefits when drug addiction and/or alcoholism is a contributing factor material to a disability claim. 42 U.S.C. §§ 423(d)(2)(C) and 1382(a)(3)(J); *Sousa v. Callahan*, 143 F.3d 1240, 1245 (9th Cir. 1998). If evidence of DAA exists and the individual succeeds in proving disability, the Commissioner must determine whether the DAA is material to the determination of disability. 20 C.F.R. §§ 404.1535 and 416.935. If an ALJ finds

1 that the claimant is not disabled, then the claimant is not entitled
2 to benefits and the analysis terminates. However, if the ALJ finds
3 that the claimant is disabled, then the ALJ proceeds and determines
4 whether the claimant would be disabled if he or she stopped using
5 alcohol or drugs.

6 **ISSUES**

7 Plaintiff alleges that the ALJ erred by improperly weighing the
8 medical evidence and by failing to obtain vocational expert
9 testimony.

10 **DISCUSSION**

11 **A. Medical Opinions**

12 Plaintiff contends that the ALJ erred by rejecting the opinions
13 of Dr. Islam-Zwart and Dr. Mabee and instead by adopting the opinion
14 of the testifying medical expert, Margaret Ruth Moore, Ph.D. ECF
15 No. 20 at 11.

16 Contrary to Plaintiff's assertions, these physicians' opinions
17 do not contradict or undercut the ALJ's determination of Plaintiff's
18 RFC. As the ALJ noted, the April 2006, assessment prepared by
19 Brooke Sjostrom, M.S., L.M.H.C., and adopted by Kayleen Islam-Zwart,
20 revealed that Plaintiff was overreporting psychopathology on the
21 MMPI-2 test, and thus his clinical personality inventory was
22 invalid. Tr. 16; 21; 360-61. A MACE test revealed Plaintiff was
23 purposefully attempting to appear impaired, using deceptive
24 practices. Tr. 361. Plaintiff's diagnoses included malingering,
25 polysubstance dependence (early full remission), and antisocial
26 personality disorder. Tr. 361. Ms. Sjostrom and Dr. Islam-Zwart
27 opined that Plaintiff's depressive symptoms were likely related to
28 Plaintiff's substance dependence diagnosis, and, if after treatment

1 he continued to complain of depression, he should be reevaluated.
2 Tr. 362.

3 The ALJ also reviewed the results of the December 2007,
4 evaluation prepared by Ashlie Hagen, M.S., LMHC, and adopted by W.
5 Scott Mabee, Ph.D. Tr. 17; 21. As the ALJ found, the evaluation
6 indicated diagnoses of antisocial personality disorder and rule-out
7 malingering. Tr. 21; 588. Also as the ALJ noted, Plaintiff was
8 examined again on January 12, 2009, by Victoria Carroll, M.S., and
9 the evaluation was adopted by Dr. Mabee. Tr. 21; 656-60. Ms.
10 Carroll also completed a Psychological/Psychiatric Evaluation. Tr.
11 661-66. On the form, Ms. Carroll indicated Plaintiff had several
12 marked and moderate limitations. Tr. 662-64. Ms. Carroll estimated
13 that Plaintiff's impairments would last a maximum of nine months.
14 Tr. 664. In the narrative report, Ms. Carroll questioned whether
15 Plaintiff was fully engaged in the testing process, and whether he
16 provided sufficient effort. Tr. 658. Plaintiff's MMPI-2 was
17 invalid due to his "overendorsing response style." Tr. 659.
18 Plaintiff's diagnoses included bipolar disorder, cocaine dependence
19 in remission, and antisocial personality disorder.¹ Tr. 659. The
20 ALJ also noted that Ms. Carroll and Dr. Mabee opined Plaintiff's
21 most prominent problems are related to his mood instability and his
22 difficulty in conforming to society norms.² Tr. 21; 659.

24 ¹The ALJ stated, "[w]hile bipolar disorder was indicated along
25 with an antisocial personality disorder, this has never been
26 substantiated." Tr. 21.

27 ²At the time of the evaluation, Plaintiff was facing 46 months'
28 incarceration. Tr. 659.

1 Margaret Moore, Ph.D., testified at the hearing that
2 Plaintiff's medical records raise the issue of malingering, symptom
3 exaggeration, antisocial personality disorder, and substance abuse.
4 Tr. 38-39. Dr. Moore noted a causal link between time periods when
5 Plaintiff complained of severe symptoms with the times Plaintiff was
6 engaging in substance abuse. Tr. 39. Dr. Moore also opined that
7 Plaintiff's activities of daily living impairments were mild both
8 when Plaintiff is sober and when he is under the influence. Tr. 41.
9 Dr. Moore opined that Plaintiff's impairments in social functioning
10 are marked when he is under the influence and moderate when sober.
11 Tr. 42. Finally, Dr. Moore opined Plaintiff's impairment in
12 maintaining concentration, persistence and pace was mild, but she
13 declined to gauge Plaintiff's limits in this category when he is
14 under the influence. Tr. 42.

15 The ALJ's analysis is based on the correct legal framework and
16 supported by substantial evidence. First, the marked and moderate
17 limitations assessed by Ms. Carroll are clearly contradicted by her
18 narrative and conclusions that Plaintiff is malingering, as well as
19 the multiple conclusions from physicians who diagnosed Plaintiff
20 with malingering, substance abuse issues and personality disorders.
21 A medical opinion may be rejected by the ALJ if it is conclusory,
22 contains inconsistencies, or is inadequately supported. *Bray v.*
23 *Comm'r Soc. Sec. Admin.*, 554 F.3d 1219, 1228 (9th Cir. 2009). Where
24 medical reports are inconclusive, questions of credibility and
25 resolution of conflicts in the evidence are functions of the ALJ.
26 *Sample v. Schweiker*, 694 F.2d 639, 642 (9th Cir. 1982), quoting
27 *Waters v. Gardner*, 452 F.2d 855, 858 n.7 (9th Cir. 1971). Because
28 Ms. Carroll's ratings of Plaintiff's impairments are contrary to her

1 narrative and the bulk of the record, the ALJ properly gave little
2 weight to the check-the-box form. Additionally, Ms. Carroll opined
3 that Plaintiff's impairments would last only a maximum of nine
4 months, well short of the one-year durational requirement³ in social
5 security disability cases. Tr. 664.

6 Moreover, the record demonstrates that, while Plaintiff may
7 have mental disorders, he has not established his disorders limit
8 his ability to perform work consistent with the residual functional
9 capacity assessed by the ALJ. The medical record is replete with
10 observations and test results indicating that Plaintiff is
11 malingering, and he has substance abuse issues. The ALJ properly
12 discounted Plaintiff's credibility based upon the malingering
13 evidence, and performed an analysis of Plaintiff's severity of
14 impairment when he was using drugs and alcohol, and a separate
15 analysis of Plaintiff's severity of impairment when he was sober.
16 Dr. Islam-Zwart and Dr. Mabee's assessments both support the ALJ's
17 conclusion that Plaintiff is not disabled. Contrary to Plaintiff's
18 arguments, the record does not support more restrictive
19 psychological findings in this case. The ALJ's RFC determination is
20 in accord with the weight of the record evidence.

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22
23 ³The Social Security Act defines a disability as the "inability
24 to engage in any substantial gainful activity by reason of any
25 medically determinable physical or mental impairment which . . . has
26 lasted or can be expected to last for a continuous period of not
27 less than 12 months." 42 U.S.C. § 423(d)(1)(A).
28

1 **B. Vocational Expert**

2 Plaintiff argues that the ALJ erred by failing to call a
3 vocational expert to testify because Plaintiff's non-exertional
4 limitations are sufficiently severe to significantly limit the range
5 of work permitted by Plaintiff's exertional limitations. ECF No. 20
6 at 11. The ALJ found that Plaintiff's ability to perform work at
7 all exertional levels has been compromised by certain specific
8 nonexertional limitations, but the limitations have little or no
9 effect on the overall occupational base of unskilled work at all
10 exertional levels. Tr. 22. As a result, the ALJ found Plaintiff
11 was not disabled. Tr. 22.

12 At step five, the burden shifts to the Commissioner to show
13 that (1) the claimant can perform other substantial gainful
14 activity; and (2) a "significant number of jobs exist in the
15 national economy" which claimant can perform. *Kail v. Heckler*, 722
16 F.2d 1496, 1498 (9th Cir. 1984). The Medical-Vocational Guidelines
17 (Grids) is a matrix system developed by the Commissioner for
18 resolving cases that involve substantially uniform functional
19 capacities. *Desrosiers v. Sec'y of Health and Human Svcs.*, 846 F.2d
20 573, 578 (9th Cir. 1988).

21 The Medical-Vocational Guidelines take notice of approximately
22 2,500 medium, light and sedentary unskilled jobs. Where non-
23 exertional limitations would not significantly erode an occupational
24 base, application of the Medical-Vocational Guidelines is
25 appropriate. *Desrosiers*, 846 F.2d at 577 ("non-exertional
26 limitations do not automatically preclude applications of the
27 grids"); *Razey v. Heckler*, 785 F.2d 1426, 1430 (9th Cir. 1986); SSR
28 83-10. "Unskilled work" involves simple duties that can be learned

1 on the job and require little or no judgment. 20 C.F.R. § 416.968;
2 *Terry v. Sullivan*, 903 F.2d 1273, 1276-77 (9th Cir. 1990). Non-
3 exertional limitations significantly erode the base when they cause
4 a "substantial" loss of the ability to meet the basic requirements
5 of unskilled work. SSR 85-15.

6 In Plaintiff's RFC, the ALJ reflected Plaintiff's non-
7 exertional moderate limitations in maintaining socially appropriate
8 behavior, adhering to basic standards of neatness and cleanliness
9 and setting realistic goals and making plans independently. Tr. 22.
10 The ALJ properly found that these moderate limitations do not
11 significantly erode the unskilled occupational base because none
12 cause a substantial loss in his ability to meet the basic
13 requirements necessary to complete simple duties that require little
14 or no judgment.

15 Additionally, most, if not all, of Plaintiff's medical records
16 indicate he is malingering. As a result, this casts doubt on the
17 claimed severity of his limitations. The ALJ's RFC findings
18 represent a rational interpretation of the record of its entirety
19 and will not be disturbed.

20 CONCLUSION

21 Having reviewed the record and the ALJ's findings, the court
22 concludes the ALJ's decision is supported by substantial evidence
23 and is not based on legal error. Accordingly,

24 IT IS ORDERED:

25 1. Defendant's Motion for Summary Judgment, **ECF No. 26**, is
26 **GRANTED**.

27 2. Plaintiff's Motion for Summary Judgment, **ECF No. 19**, is
28 **DENIED**.

1 The District Court Executive is directed to file this Order and
2 provide a copy to counsel for Plaintiff and Defendant. Judgment
3 shall be entered for **DEFENDANT** and the file shall be **CLOSED**.

4 DATED January 18, 2013.

5
6 S/ CYNTHIA IMBROGNO
7 UNITED STATES MAGISTRATE JUDGE
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